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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | | |
|--------------------------|---|------------------------------|
| STATE OF IDAHO, |) | Supreme Court Case No. 40985 |
| |) | |
| Plaintiff/Respondent, |) | Case No: CR-MD-2011-0017076 |
| vs. |) | |
| |) | APPELLANT'S BRIEF |
| KEVIN MICHAEL NICOLESCU, |) | |
| |) | |
| Defendant/Appellant. |) | |
| |) | |
| |) | |

Appeal from the District Court of the Fourth Judicial
District of the State of Idaho, in and for the County of Ada

Honorable Michael McLaughlin
District Judge, Presiding

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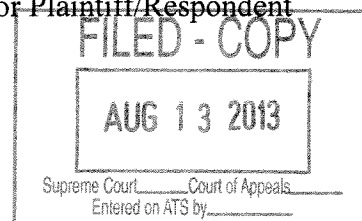


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I. STATEMENT OF FACTS

A. Nature Of The Case

This an appeal by the Appellant, Kevin Michael Nicolescu, based upon the District Court's Memorandum Decision and Order entered on April 16, 2013 reversing the Magistrate's Memorandum Decision Regarding Motion to Suppress entered on July 25, 2012 granting Appellant's Motion to Suppress and excluding any and all evidence that was derived from the preliminary breath test and later obtained as a result thereof.

B. Procedural History

Mr. Nicolescu was cited for the misdemeanor charge of Driving under the Influence of Alcohol, Idaho Code § 18-8004 on October 15, 2011. *See, R.*, p. 5.

On October 27, 2011, the undersigned counsel filed a Notice of Appearance and other pleadings, including an extension of time to file pre-trial motions which the Magistrate Court granted. *See, R.*, pp. 6-8. On December 5, 2011, Mr. Nicolescu filed his Motion to Suppress and the evidentiary hearing was held July 2, 2012. *See, R.*, pp. 38-51 and 71.

After taking the matter under advisement, The Honorable John Hawley issued his Memorandum Decision Regarding Motion to Suppress on July 25, 2012, granting Mr. Nicolsecu's Motion to Suppress. *See, R.*, pp. 73-83. On August 29, 2012, the State filed its Notice of Appeal and Motion to Hold Matter in Abeyance. *See, R.*, pp. 86-90.

On April 3, 2012, oral argument was presented to the District Court on the State's appeal. After taking the matter under advisement, The Honorable Michael McLaughlin issued his Memorandum Decision and Order on April 16, 2013, reversing the Magistrate's decision. *See, R.*, pp. 162-175.

On May 3, 2012, Mr. Nicolescu filed his Notice of Appeal. *See, R.*, pp. 176-179.

C. Statement of Facts

On October 15, 2011, Mr. Nicolescu was driving on Idaho Street on his way home when his vehicle was T-boned by a driver who ran a red light at the intersection. *See, R.*, p. 50. The driver of the other vehicle, James F. Pollard, was charged and pled guilty to inattentive driving. *See, R.*, p. 25.¹ Officer Chris Palic responded to the vehicular collision at the intersection of Idaho and 16th streets in the city of Boise. *See, R.*, p. 73.² At the scene, Officer Palic made contact with Kevin Nicolsecu who was one of the drivers involved in the collision. *See id.*

During the contact, Officer Palic detected a strong odor of alcohol coming from Mr. Nicolescu as he spoke. *See id.* In addition, Officer Palic noted that Mr. Nicolescu had red, bloodshot, watery eyes and Mr. Nicolsecu stated he had consumed some alcohol that evening. *See, R.* p. 74. Officer Palic observed cuts and abrasions to Mr. Nicolescu's face which he assumed were caused by the deployment of the airbag during the collision. *See, R.*, p. 73. Officer Palic also noted that Mr. Nicolescu was not slurring his speech and did not show any signs of memory impairment. *See id.* Officer Palic was not aware of any traffic infractions or driving pattern because his only contact was with Mr. Nicolescu was after the collision. *See, R.*, p. 74.

At that point, Officer Palic asked Mr. Nicolescu to submit to the Horizontal Gaze Nystagmus (HGN) test. *See id.* Mr. Nicolescu complied and Officer Palic began to administer the test, but then had to stop the test because Mr. Nicolescu's left eye was bothering him. *See id.* Officer Palic tried to continue the test again, but was only able to get a "partial nystagmus test" "cause it was clearly bothering him." (TR., p. 9, Ll 1-12).³ Based on the partial nystagmus test

¹ The State's response to request for discovery referred the defense to the on-line *Idaho Supreme Court Data Repository* at <https://www.idcourt.us> to discover the criminal history of the witnesses it identified.

² The District Court recited the Magistrate's factual findings verbatim. *See, R.*, pp. 163-165.

³ Transcript of the evidentiary hearing held on July 2, 2012 before the Honorable John Hawley, Jr., Magistrate Court Judge.

performed, Officer Palic detected four (4) decision points out of the possible six (6) decision points. *See, R.*, p. 74. Paramedics on the scene examined Mr. Nicolescu and noted he had a scratched cornea at the time the HGN test was administered. *See, R.*, p. 75.

Officer Palic elected not to conduct any other Field Sobriety Tests (FSTs) because of the adrenaline setting in from the collision. *See, R.*, p. 74. Officer Palic felt that because of the adrenaline, going forward with other FSTs would have clearly affected his performance on them. (TR., p. 10, Ll. 2-13, p. 18, Ll. 13-15). On cross-examination, when asked why he elected not to administer any further FSTs, Officer Palic responded:

Again, it was to benefit Mr. Nicolescu. I could tell he was obviously - - the adrenaline was starting to kick in from the collision; I could just tell that just based on how he was standing, you could see him physically shaking. **So, to give him the benefit of the doubt, I was not going to make him go through those, 'cause clearly he would have met decision points and it would have been much harder to determine, okay, is that the result of him and adrenaline.**

(Tr., p. 18, Ll. 16-25) (Emphasis added).

At this point, Officer Palic decided to administer a preliminary breath test with the Alco-Sensor which produced a result of .108. *See, R.*, p. 75. Based on the result from the preliminary breath test, Officer Palic continued his investigation and then proceeded to observe the 15 minute wait period, played him the ALS advisory form, checked the Lifeloc device and administered two additional breath samples. *See id.*

On cross-examination, Officer Palic acknowledged that it was reasonable to conclude that dust and debris from the deployment of an air bag would give the appearance of someone having glassy and bloodshot eyes. (TR., p. 13, Ll. 20-25, p. 14, Ll. 1-18).

Both Officer Palic and Officer Moore acknowledged when administering an evidentiary test, it is mandatory procedure to wait 15 minutes before administering the test. (TR., p. 19, Ll. 10-25, p. 20, L. 1, p. 35, Ll. 12-25, p. 36, L. 1). When Officer Palic decided to administer the

preliminary test, he admitted that he did not conduct the mandatory 15 minute wait period. (TR., p. 20, Ll. 2-5).

Officers Palic and Moore, Palic's supervisor, testified that they were unaware of any statutory authority or any rules or regulations that governed administering a preliminary test. (TR., p. 20, Ll. 9-25, p. 33, Ll. 2-25, p. 34, Ll. 1-2).

Officer Palic stated that he had enough information and would have placed Mr. Nicolescu under arrest regardless of the preliminary breath test. (TR., p. 10, Ll. 19-25, p. 11, Ll. 1-4). However, Officer Moore's testimony contradicted Officer Palic's opinion. When asked, Officer Moore responded as follows:

By Mr. Guerricabeitia:

Q. If Mr. Nicolsecu had blown a - - under a .08, would he have been arrested?

A. No.

By Ms. Miller:

Q. When you say he would not have been arrested had he blown under a .08, are you talking about the evidentiary test that you did?

A. No. In -

Q. Are you -

A. - regards to the presumptive. I - I call it a presumptive test rather than a preliminary test.

Q. Okay. And so, you're saying that if he would have blown under the .08 for - oh, I guess -

A. Using the ALCO-SENSOR, had that been under the .08, no, I don't believe we would have proceeded any further with it.

Q. Even given the other observations that you made?

A. More than likely yes, that would have not happened.

(TR., p. 40, Ll. 9-11 and 20-25, p. 41, Ll. 1-10).

Officer Moore corroborates his conclusion, noting that he has on occasion relied on the results of a preliminary breath test to support his belief and/or probable cause despite acknowledging the results produced by the ALCO-SENSOR are not accurate or certified by the

State. (TR., p. 37, Ll. 11-25, p. 38, L. 1).

A. . . . we typically use it for, you know, have somebody that's been drinking alcohol, to – you know, whether or not they've been drinking or not so.

I have, on occasion, used a couple of them to check and see where they're at, as far as (unintelligible) a performance verification on them, and they're typically very close to what they should be. They match what – the solution we use, a .08 and .20.

So, typically, they were – they're close, but they're just not – the State has never touched them and certified them as – for use in the field as an evidentiary test.

Officer Moore's response on re-direct further corroborates that without the preliminary breath test result, the investigation would have been done and Mr. Nicolescu would not been arrested on the suspicion of driving under the influence:

Q. And when you are giving a preliminary breath test, what is it that you're interested in obtaining from the test?

A. Typically, it's for the purpose of showing that he is consuming alcohol and – **and sometimes, you know, where he's at as far as the amount of alcohol in his system.**

Q. Okay. Are you interested in the specific number in that –

A. Not –

Q. – event?

A. – not necessarily, no.

(TR., p. 39, Ll. 14-25).

III. ISSUES PRESENTED ON APPEAL

A) Whether the District Court erred in finding as a Matter of Law that the Preliminary Breath Test was not an Evidentiary Test as described under the Idaho Code;

B) Whether the District Court erred in finding as a Matter of Law that Reasonable and Articulate Suspicion was the Legal Standard to Administer the Preliminary Breath Test; and

C) Whether the District Court erred in finding as a Matter of Law that the preliminary breath test result could be used to form the basis of probable cause to administer further evidentiary testing.

IV. LEGAL ARGUMENT

A. Standard of Review

On appeal from a trial court's order resolving a motion to suppress evidence, the appellate court defers to the trial court's findings of fact if they are supported by substantial evidence, but freely reviews the trial court's determination and application of constitutional principles to the facts found. *State v. Watts*, 142 Idaho 230, 232, 127 P.3d 133, 135 (2005).

"At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence and draw factual inferences vested in the trial court." *State v. Leclercq*, 149 Idaho 905, 907, 243 P.3d 1093 (App.2010).

In *State v. Dewitt*, 145 Idaho 709, 711, 184 P.3d 215, 217 (App. Ct. 2008), the Idaho Court of Appeals noted that the Idaho Supreme Court altered the standard of review of a decision of the district court acting in its appellate capacity.

Rather than directly reviewing the magistrate court's decision independently of, but with due regard for, the district court's decision, we instead directly review the district court's decision. (Citation omitted). We do examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. (Citation omitted).

B. The District Court erred in finding as a Matter of Law that the Preliminary Breath Test was not an Evidentiary Test as described under the Idaho Code.

On appeal from the Magistrate, the State argued the Magistrate erred in holding that Mr. Nicolescu did not consent freely, understandingly and voluntarily to the preliminary breath test because Idaho Code § 18-1002(1) provided the necessary consent to administer any breath or blood test from a suspect who was driving on public roads and therefore an officer did not have

to obtain specific consent. *See, R.*, p. 106-108. The District Court disagreed and addressed the State's argument as follows:

However, if this were considered as an evidentiary test, Mr. Nicolescu would also have the right to be informed, "[a]t the time of the evidentiary testing. . . that if he refuses to submit to or if he fails to complete, evidentiary testing" he is subject to certain sanctions. Mr. Nicolescu was not informed of this, and since the court does not believe that a preliminary breath test is an "evidentiary test," so it appears that this code section cannot be relied upon to provide implied consent for Mr. Nicolescu. *See, R.*, p. 167.

Instead, the District Court accepted the State's alternative argument that the preliminary breath was not an evidentiary test for purposes of Idaho Code § 18-8002(1) but rather a roadside field sobriety test requiring reasonable suspicion to be administered.

In concluding that the preliminary breath test administered was akin to a field sobriety test rather than an evidentiary test, the District Court held the officer only needed reasonable and articulable suspicion to administer the preliminary breath test, relying on *State v. Ferreira*, 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999) holding that "based on established precedent and thorough analysis, that the Fourth Amendment of the United States Constitution requires only that an officer possess reasonable suspicion that a driver is operating a vehicle contrary to I.C. § 18-8004 before field sobriety tests may be administered." *See id.*, 133 Idaho at 480-81, 988 P.2d at 705-06.

In support of the conclusion that a preliminary breath test is the same or similar to field sobriety testing, the District Court relied on general statements from other jurisdictions which equated a preliminary breath test to physical field sobriety tests, specifically, *State v. Lucas*, 934 N.E.2d 202 (Ind. Ct. App. 2010) and *State v. Kinney*, 190 Vt. 195, 27 A.3d 348 (2011). *See, R.*, p. 170. However, the Indiana and Vermont cases are distinguishable from the case at hand, in that both Indiana and Vermont Legislatures specifically addressed and codified the use of preliminary breath tests as a means to determine the presence of alcohol and/or whether

probable cause existed for an arrest.⁴

Idaho's Legislature has not addressed or codified the use of preliminary breath tests under the DUI statutes. Incidentally, neither has the Idaho state police promulgated any rule or regulation regarding the use of preliminary breath tests in a DUI context. The Idaho Constitution vests the legislative branch with the exclusive power to create statutes or laws while the judicial branch has the exclusive authority to interpret those laws. *Mead v. Arnell*, 117 Idaho 660, 664 & 669, 791 P.2d 410, 414 & 419 (1990).

The District Court found that the specific lack of authorization or prohibition of preliminary breath tests under the Idaho Code was not dispositive because field sobriety tests are, also, not specifically authorized under the Idaho Code. *See*, R., p. 167. The Indiana and Vermont cases in which the District Court relied on with regards to preliminary breath tests, also, do not specifically authorize field sobriety tests such as the HGN test, walk and turn, one legged stand and other physical dexterity tests, however, do specifically authorize preliminary breath tests under their statutory framework. The fact that those jurisdictions specifically include preliminary breath tests as a means, but omit other investigative tools would indicate that preliminary breath tests are unique to other forms of physical sobriety tests which are subjective and not indicative of any concentration level of alcohol, but merely indicative of the presence of alcohol use by a person. *See State v. Garrett*, 119 Idaho 878, 881, 811 P.2d 488, 491 (1990) ("We note, however, that the HGN test results are not admissible for all purposes. HGN test results may not be used at trial to establish the defendant's blood alcohol level in the absence of the chemical analysis of the defendant's blood, breath, or urine.") (Emphasis added).

⁴ Attached hereto as an addendum is a copy of the Indiana and Vermont statutes referenced in the cases cited by the District Court. *See*, I.A.R. 35(f).

The District Court distinguished an evidentiary test from a preliminary breath test stating:

“Evidentiary testing” means a test that is conducted for the purpose of determining alcohol concentration. In other words, an evidentiary test is a test conducted for the purpose of establishing proof of the level of alcohol concentration in a person. That is not the purpose of a preliminary breath test. A preliminary breath test is utilized, as discussed in more detail hereinafter, like any other field sobriety test, as “a method for making a threshold determination as to whether a person has consumed alcohol.” *State v. Lucas*, 934 N.E.2d 202, 205 (Ind. Ct. App. 2010). A preliminary breath test, consequently, is not an evidentiary test, as that term is described in the Idaho Code. *See. R.*, p. 167 (Fn. 3).

In *New Phase Investments, LLC v. DAFCO, LLC*, 153 Idaho 207, 280 P.3d 710 (2012),

the Idaho Supreme Court set forth the standard for statutory interpretation as follows:

When faced with a question of statutory interpretation, this Court takes the following approach:

The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document... When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction. *Id.*, 153 Idaho at 210, 280 P.3d at 713.

Under Idaho’s DUI statutes there are several references and definitions describing an

“evidentiary test.” Idaho Code § 18-8002(9) defines an evidentiary test as follows:

(9) For purposes of this section and section 18-8002A, Idaho Code, “evidentiary testing” shall mean **a procedure or test** or series of procedures or tests, including the additional test authorized in subsection (10) of this section, **utilized to determine the concentration of alcohol** or the presence of drugs or other intoxicating substances in a person. (Emphasis added).

Idaho Code § 18-8002A(1)(e) defines “evidentiary testing” as:

“Evidentiary testing” means **a procedure or test** or series of procedures or tests **utilized to determine the concentration of alcohol** or the presence of drugs or other intoxicating substances in a person, including additional testing authorized by subsection (6) of this section. An evidentiary test for alcohol concentration shall be based on a formula of grams of alcohol per one hundred (100) cubic centimeters of blood, per two hundred ten (210) liters of breath, or sixty-seven

(67) milliliters of urine. **Analysis of blood, breath or urine for the purpose of determining alcohol concentration** shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by the Idaho state police, or by any method approved by the Idaho state police.

Notwithstanding any other provision of law or rule of court, the results for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated and approved by the Idaho state police or by any method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination. (Emphasis added). *See also*, Idaho Code § 18-8004(4).

The code sections referenced above do not create a distinction between a preliminary or “presumptive” breath test from an evidentiary breath test. However, the above referenced code sections do provide procedural requirements necessary in order for a breath test result to be offered as evidence at trial.

In this case, the purpose of the preliminary breath test with the Alco-Sensor administered by Officer Palic was to determine the concentration of alcohol in Mr. Nicolescu’s system, not for determining the presence of alcohol. Officer Palic already had actual knowledge that Mr. Nicolescu had drank that evening by his admission and the odor of alcohol. Officer Palic was uncertain, speculating and using his instinct to confirm or dispel his belief that Mr. Nicolescu **may** have committed a crime. In other words, Officer Palic had a hunch. The testimony of Officer Moore on redirect with the State supports this:

Q. And when you are giving a preliminary breath test, what is it that you’re interested in obtaining from that test?

A. Typically, it’s for the purpose of showing he is consuming alcohol, and – and sometimes, you know, where he’s at as far as the amount of alcohol in his system.

Q. Okay. Are you interested in the specific number in that –

A. Not –

Q. – event?

A. – not necessarily, no.

Officer Moore also testified that on occasion he would use the preliminary breath test results to “see where they’re at, as (unintelligible) a performance verification on them, and

they're typically very close to what they should be. . . So, typically, they were – they're close, but they're just not – the State has never touched them and certified them as – for use in the field as an evidentiary test.” (TR., p. 37, Ll. 19-21, Ll. 23-25, p. 38, L. 1).

The result from the preliminary breath test was the only reason the investigation continued which then proceeded to the subsequent breath tests administered with the LifeLoc device to determine the concentration of alcohol in Mr. Nicolescu's system for purposes of trial. Officer Moore testified that had the preliminary breath test result been under .08 the investigation would have been concluded, refuting Officer Palic's testimony that he would have arrested Mr. Nicolescu without the preliminary breath test result. It was the preliminary breath test result which provided Officer Palic the probable cause he needed to administer the subsequent breath tests with the LifeLoc device. From the statutory language, it is clear that an evidentiary test is any breath, urine or blood test used to determine the concentration of alcohol in a person, regardless of the admissibility of the results. The District Court's distinction between a preliminary versus an evidentiary breath test is unfounded under the plain language of the statute and the facts of this case.

Based on the foregoing, the District Court's ruling that the preliminary breath test was not an evidentiary test as described under the Idaho Code should be reversed.

C. The District Court erred in finding as a Matter of Law that Reasonable and Articulable Suspicion was the Legal Standard to Administer the Preliminary Breath Test.

The District Court's finding that the preliminary breath test was another form of field sobriety test, not an evidentiary test, supported its holding that Officer Palic met the lesser standard of reasonable suspicion to administer the preliminary breath test. As discussed above, there is no distinction between a preliminary breath test and an evidentiary test as described under the Idaho Code.

The Fourth Amendment of the U.S. Constitution forbids unreasonable searches and seizures. U.S. Const. amend. IV. The administration of a blood alcohol test constitutes a seizure of the person and a search within the purview of the Fourth Amendment to the United States Constitution. *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1833–34, 16 L.Ed.2d 908, 917–18 (1966); *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007).

A search conducted without a warrant is *per se* unreasonable unless the state can prove that the search falls into one of the exceptions to the warrant requirement. *Schneckloth v. Bustamante*, 412 U.S. 218, 219 (1973); *State v. Jaborra*, 143 Idaho 94, 97 (Ct. App. 2006). Consent is one of the exceptions to the warrant requirement. *State v. Zavala*, 134 Idaho 532 (Ct.App. 2000). An investigative stop is also an exception to the warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Ferreira*, 133 Idaho 474, 479, 988 P.2d, 700, 705 (Ct.App.1999).

Idaho Code § 18-1002(1) sets forth the standard for testing a driver's alcohol concentration and the presence of drugs and other intoxicating substances. The code section reads:

Any person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol as defined in section 18-8004, Idaho Code, and to have given consent to evidentiary testing for the presence of drugs or other intoxicating substances, **provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that the person has been driving or in actual physical control of a motor vehicle in violation of the provisions of section 18-8004, Idaho Code, or section 18-8006, Idaho Code.** (Emphasis added).

Idaho Courts have yet to decide the proper legal standard for an officer to request a breath test. Based on a recent decision, it appears that the standard for any evidentiary testing is something more than reasonable suspicion.

In *Thompson v. State*, 138 Idaho 512, 515, 65 P.3d 534, 537 (Ct. App. 2003), this Court stated that it was not clear that probable cause was the correct standard for an officer to arrest a suspect and request a breath test, even though the defendant and the state agreed that it was the applicable prerequisite. Because the higher standard of probable cause was satisfied in this instance, this Court declined to resolve the narrow issue. Probable cause existed in *Thompson* where the officer observed the defendant speeding, detected a strong odor of alcohol on his breath, observed bloodshot eyes and dilated pupils, was aware that the defendant refused to take field sobriety tests, and had reason to believe the defendant lied when he stated that he had not been drinking. Collectively, these circumstances supported the officer's reasonable belief that the defendant was driving while under the influence. *See id.*

This Court further stated in *Thompson* that its decision in *State v. Ferreira*, 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999), where it held that officers may administer field sobriety tests based on reasonable suspicion, suggested that the lesser standard of reasonable suspicion may suffice for an officer administering evidentiary tests. *Id.*

However, field sobriety tests and evidentiary tests are not synonymous. As noted above, an evidentiary test is the testing of blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs or other intoxicating substances in a person. I.C. § 18-8002A(1)(e). Field sobriety tests are generally categorized as standardized and non-standardized testing. Standardized testing established by the US National Highway Traffic and Safety Administration include the One-Leg Stand, Walk and Turn and HGN tests. Non-standardized testing includes Rhomberg Balance test, Finger-to-Nose test, Finger-Count Test, Hand Pat test, ABC test and Numbers Backward test. These field sobriety tests consist of various cognitive and coordination tasks, but none can quantify a concentration level of a person's blood alcohol content.

Since the lesser standard applies to field sobriety tests and Idaho Code § 18-8002(1) requires an officer to have reasonable grounds to believe before requesting a suspect to submit to evidentiary testing, it appears from the statute that more than reasonable suspicion is required for an officer to administer evidentiary testing.

In *State v. Martinez-Gonzalez*, 152 Idaho 775, 275 P.3d 1 (Ct. App. 2012), this Court again analyzed and discussed the proper legal standard between reasonable suspicion versus probable cause in the context of a DUI case. In *Martinez-Gonzalez*, officers were called to an apartment complex parking lot to investigate suspicious activity. The officers encountered Martinez-Gonzalez sitting in the driver's seat of a parked car with two other passengers. Martinez-Gonzalez explained they were drinking in the vehicle to avoid upsetting their wives. During the encounter, officers observed open beer cans in the front and back seats of the vehicle, Martinez-Gonzalez slightly slurred speech, glassy eyes, detected the odor of alcohol and Martinez-Gonzalez admitted to consuming alcohol. Officers advised him to walk home, but instead, he started the vehicle and drove across the parking lot. Officers initiated a stop and asked him to perform field sobriety tests which he refused to perform. Thereafter, an officer arrested Martinez-Gonzalez on suspicion of driving under the influence.

During the search of his person, officers discovered methamphetamine in his pocket. Martinez-Gonzalez submitted to a breath test which revealed a blood alcohol content below the legal limit. Martinez-Gonzalez was not charged for DUI, but instead felony possession of a controlled substance. Martinez-Gonzalez moved to suppress the evidence on the grounds that the officer lacked probable cause he was under the influence of alcohol and the DUI charge occurred on private property not covered by the criminal statute. The district court rejected both arguments which he appealed.

On appeal, Martinez-Gonzalez argued the officer had only a mere hunch or unparticularized suspicion that he was under the influence of alcohol and therefore had no probable cause as to the first element of the DUI offense. The State responded that the officer had reasonable suspicion to administer field sobriety tests which rose to probable cause to arrest him on suspicion of DUI after he refused to participate in the field sobriety tests.

This Court cited several of its cases and the facts which led to its determination that probable cause to arrest an individual for suspicion of DUI was satisfied, including *Ferreira, supra*, and *Thompson, supra*, cases. In referring to its decision in *Thompson*, this Court stated, “[W]e later concluded that a driver’s refusal to participate in field sobriety tests may be a factor in determining whether probable cause exists that a driver is under the influence of alcohol, as the refusal or evasion of field sobriety tests can infer a guilty conscience.” *See id.*, 152 Idaho at 779-80, 275 P.3d at 5-6. Accordingly, this Court concluded that since field sobriety tests are used to confirm or dispel an officer’s reasonable suspicion that a driver is under the influence of alcohol, and since performing poorly on such tests **“can raise the level of suspicion to probable cause, the driver’s refusal to participate may do the same.”** *See id.*, 152 Idaho at 780, 275 P.3d at 6. (Emphasis added).

In its review of the record, the facts found by the district court in determining probable cause were 1) open beer cans in front and back seats, 2) glazed eyes and slurred speech, 3) odor of alcohol, 4) admission of drinking, 5) driving after being advised not to and 6) refusing to participate in field sobriety tests. This Court held that due to the lack of evidence in the record and no contradictory facts to those testified by the arresting officer, the facts found by the district court were supported by the record and sufficient to establish probable cause for a DUI arrest. *See id.*

Alternatively, this Court held that even if the facts did not constitute probable cause, they certainly met the threshold of reasonable suspicion for the officer to conduct field sobriety tests which Martinez-Gonzalez refused to perform. Again, this Court found no evidence or contradictory testimony presented by the defense to the district court's conclusion. This Court specifically noted that the appellate court defers credibility determinations to the trial court which found the officer's testimony credible. *See id.* 152 Idaho at 780-81, 275 P.3d at 6-7.

Although this Court did not specifically resolve the issue in the *Thompson* case of the legal standard necessary to request an individual to submit to a breath test in a DUI case, the facts and Court's statements expressed in the *Martinez-Gonzalez* decision can reasonably be inferred that the legal standard for a request to submit to a breath test is probable cause.

Specifically, this Court's statement is compelling: "[B]ecause field sobriety tests are used to either confirm or dispel an officer's reasonable suspicion that a driver is under the influence of alcohol, just as performing poorly on such tests **can raise the level of suspicion to probable cause, the driver's refusal to participate may do the same.**" *See id.*, 152 Idaho at 780, 275 P.3d at 6. (Emphasis added).

In addition, this Court agreed with the district court's determination that probable cause existed before the defendant submitted to the breath test. The facts found which lead to the arrest of Martinez-Gonzalez on suspicion of driving under the influence of alcohol occurred before the breath test was administered. *See id.*, 152 Idaho at 777, 275 P.3d at 3.

In *State v. Julian*, 129 Idaho 133, 922 P.2d 1059 (1996), the Idaho Supreme Court expressed the standard for probable cause as follows:

Reasonable or probable cause is the possession of information that would lead a person of ordinary care and prudence to believe or entertain an **honest and strong presumption that such person is guilty.** (Citation omitted). Probable cause is not measured by the same level of proof required for conviction. (Citation omitted). Rather, it deals with "the factual and practical considerations of

everyday life on which reasonable and prudent [persons], not legal technicians, act.” (Citation omitted).

When reviewing an officer’s actions the court must judge the facts against an objective standard. That is, “would the facts available to the officer at the moment of the seizure or search ‘warrant a [person] of reasonable caution in the belief’ that the action taken was appropriate.” (Citation omitted). Because the facts making up a probable cause determination are viewed from an objective standpoint, the officer’s subjective beliefs concerning that determination are not material. (Citations omitted). *Id.*, 129 Idaho at 136-37, 922 P.2d at 1062-63. (Emphasis added).

Reasonable suspicion requires less than probable cause, but more than mere speculation or instinct on the part of the officer. *State v. McCarthy*, 133 Idaho 119, 124, 982, P.2d 954, 959 (Ct. App. 1999). “Subjective good faith on the part of the officer is not enough.” *Id.*

Reasonable suspicion is based on the totality of the circumstances and “the whole picture must yield a particularized and objective basis for suspecting that the individual being stopped is or has been engaged in wrongdoing.” *State v. Van Dorne*, 139 Idaho 961, 963, 88 P.3d 780, 782 (Ct. App. 2004).

In the case at hand, the objective facts in the record at first contact with Mr. Nicolescu were 1) Officer Palic detected an odor of alcohol coming from Mr. Nicolescu, 2) he noted red, bloodshot and watery eyes, and 3) Mr. Nicolescu admitted to consuming alcohol earlier in the evening.

In addition to those facts, other facts made by the Magistrate which could be reasonably viewed to dispel reasonable suspicion were Officer Palic noted no slurred speech or memory impairment and observed cuts and abrasions to Mr. Nicolescu’s face which he assumed were caused the deployment of the airbag, as well as, could have caused the red, watery and bloodshot eyes. Paramedics were at the scene and diagnosed Mr. Nicolescu with a scratched cornea to his left eye. Officer Palic was unaware of any traffic infractions or driving pattern performed by Mr. Nicolescu, other than he was responding to a motor vehicle collision involving Mr. Nicolescu.

At this point in the investigation, Officer Palic may have had enough reasonable and articulable suspicion to request Mr. Nicolescu to submit to field sobriety tests.

Officer Palic admitted he was only able to perform a partial nystagmus test and during the test he could tell Mr. Nicolescu's left eye was clearly bothering him. (TR., p. 9, Ll. 1-4 and 10-12). The record shows Mr. Nicolescu had a scratched cornea during the performance of the HGN test. Based on the partial nystagmus test, Officer Palic detected four (4) decision points out of a total of six (6). Officer Palic decided not to have Mr. Nicolescu to perform any other field sobriety tests, his reason being:

Again, it was to benefit Mr. Nicolescu. I could tell he was obviously - - the adrenaline was starting to kick in from the collision; I could just tell that just based on how he was standing, you could see him physically shaking. **So, to give him the benefit of the doubt, I was not going to make him go through those, 'cause clearly he would have met decision points and it would have been much harder to determine, okay, is that the result of him and adrenaline.**

The Idaho Supreme Court has held that a positive HGN test in conjunction with other field sobriety tests may supply probable cause for arrest, but standing alone does not provide proof positive of driving under the influence of alcohol. *State v. Garrett*, 119 Idaho 878, 811 P.2d 488 (1991); *c.f. State v. Ferreira*, 133 Idaho 474, 988 P.2d 700 (Ct. App. 1999) (defendant failed HGN test, one-leg stand test, and heel-toe walking test).

Officer Palic, not Mr. Nicolescu, elected not to conduct any further field sobriety tests because he would not have been able to determine whether the failure of those tests was the result of alcohol or the accident. However, as mentioned above, other non-standardized field sobriety tests focusing on the cognitive function could have been offered.

Officer Palic testified he was familiar with the deployment of airbags and that the red, blood shot and watery eyes could have been caused by dust and debris from the deployment of the airbag. Officer Palic also stated that he could not remember whether he spoke to paramedics

to confirm Mr. Nicolescu was medically cleared before administering the HGN test.

At this point of the investigation, just prior to having Mr. Nicolescu submit to the preliminary breath test, the objective facts Officer Palic possessed at the time were 1) he detected the odor of alcohol on Mr. Nicolescu's breath, 2) Mr. Nicolescu admitted to drinking alcohol that night and 3) he conducted a partial HGN test which he detected 4 out of 6 decisions points to Mr. Nicolescu who had suffered a scratched cornea from the deployment of the airbag as a result of the collision.

Other objective facts which a reasonable and prudent person would have considered were that Mr. Nicolescu was not slurring his speech, showed no signs of memory impairment, suffered a scratched cornea, and debris had gotten into his eyes which Officer Palic acknowledged could have been the reason for the eyes appearing red, glassy and bloodshot. At this point, Officer Palic did not have probable cause to request Mr. Nicolescu to submit to a preliminary breath test. Only after Officer Palic reviewed the test result for a general concentration level of alcohol in Mr. Nicolescu's system did he then arrest him and proceed forward with administering additional breath tests with the LifeLoc.

Based on the totality of the circumstances known to Officer Palic at the time and from the view of an objective standard through a reasonable and prudent person having available all the same facts, Officer Palic did not have the requisite probable cause to request Mr. Nicolescu's to submit to the preliminary breath test. Absent the result of the preliminary breath test, Officer Moore testified that the investigation would have been concluded. Even if the officer only needed to satisfy reasonable and articulable suspicion, in order to request Mr. Nicolescu to submit to the preliminary breath test, the statute does not authorize administering a preliminary evidentiary test in order to substantiate probable cause to arrest and administer more evidentiary tests. Probable cause must exist **before** an officer may administer evidentiary tests. *See*

Martinez-Gonzalez, supra.

Officer Palic's only reason for administering the preliminary breath test, despite having knowledge of Mr. Nicolescu's admission to drinking that evening and his detection of an alcoholic odor, was nothing prohibited him from doing so. (TR., p. 20, Ll. 9-13).

Q. Okay. You testified earlier that – that you believed you had enough information to – to arrest Mr. Nicolescu regardless of the preliminary breath test; is that correct?

A. Correct.

Q. I guess I'm going to ask why, then, have him submit to a preliminary breath test?

A. I guess my question to you would be why not? Again, it's another tool that's allowed to me, that I can use.

(TR., p. 26, Ll. 24-25, p.27, Ll. 1-8).

The same response was true for Officer Moore:

Q. So, why administer a preliminary breath test, that there was no need to, to test – for determination of or detecting alcohol in his system.

A. Well, some officers do it, some don't. I – I don't personally like doing it, but some officers do and there's no – nothing that says we can't. . .

(TR., p. 35, Ll. 5-10).

The Magistrate, not the District Court, had the power to judge the witnesses' credibility, weigh the evidence, resolve factual conflicts and could draw reasonable inferences from their testimony and concluded that the preliminary breath test result of .108 was the only reason the officers had reasonable and articulable suspicion and/or probable cause to arrest Mr. Nicolescu for suspicion of driving under the influence and request him to submit to further evidentiary testing.

“In this case Palic testified that based on what he had observed he would have arrested Nicolescu for suspicion of DUI prior to administering the preliminary test. However, Palic's comments demonstrate there was uncertainty as to whether Nicolescu was under the influence. Palic indicated to Nicolescu that **after** the preliminary breath test he would make his determination from there.” *See, R., p. 79.* (Emphasis added).

Generally, cases in Idaho that involve probable cause for arrest on suspicion of driving under the influence require more objective evidence than just the odor of alcohol, admission of drinking and a partially completed HGN test as evidence of alcohol use in violation of Idaho Code § 18-8004. *See State v. Finnicum*, 147 Idaho 137, 140, 206 P.3d 501, 504 (Ct. App. 2009) (concluding that probable cause existed to arrest the defendant who smelled strongly of alcohol, slurred her speech, has glassy and bloodshot eyes, seemed confused, and failed the field sobriety tests); *State v. Buell*, 145 Idaho 54, 175 P.3d 216 (Ct. App. 2008) (probable cause existed for arrest where defendant lost footing when exiting vehicle, admitted to consuming alcohol, and failed field sobriety tests); *State v. Zubizaretta*, 122 Idaho 823, 828, 839 P.2d 1237, 1242 (Ct. App. 1992) (concluding that probable cause existed to arrest the defendant where the defendant had difficulty speaking and standing, he smelled of alcohol, he had watery eyes, urine-soaked trousers, an agitated attitude, and failed field sobriety tests).

D. The District Court erred in finding as a Matter of Law that the Preliminary Breath Test could be used to form the basis of Probable Cause to Administer Further Evidentiary Testing.

Based on the District Court's conclusion that a preliminary breath test is simply another type of field sobriety test and not an evidentiary test as described in the Idaho Code, Officer Palic only needed reasonable suspicion to administer the preliminary breath test. Accordingly, the District Court concluded that the result of the preliminary breath test, regardless of its admissibility, could be used to form the basis of probable cause to administer further evidentiary testing. *See, R.*, p. 172 (FN. 4). The District Court held:

Since Officer Palic had reasonable suspicion to believe that Mr. Nicolescu was driving under the influence, and it was not feasible to have him undergo standard field sobriety testing, Officer Palic was authorized to direct him to submit to the preliminary breath test, with or without his consent. *See, R.*, p. 173.

The District Court cited the unpublished opinion of *State v. Carver*, 2001 WL 34094000, *1 (D.Id.) for the general statement that the First Judicial District's review of the case law suggested that "the near unanimous holdings of Courts in other jurisdictions throughout the nation has been to limit the use of test results of the preliminary breath testing devices to determining the issue of probable cause" in support of the proposition that the preliminary breath test result could be used to support Officer Palic's probable cause to arrest Mr. Nicolescu for suspicion of driving under the influence. *See id.* Notwithstanding, the issue addressed in the unpublished opinion is distinct and does not provide guidance to the issue at hand.

However, the Washington Supreme Court did address a closely related issue and its reasoning is persuasive and applicable to the case at hand. In *State v. Smith*, 922 P.2d 811, 130 Wash.2d 215 (Wash. 1996), the Washington Supreme Court addressed the use of preliminary breath test results for purposes of establish probable cause for an arrest on suspicion of driving under the influence. Here, the trooper was traveling southbound when he observed a vehicle coming toward him veer over the center line into his lane, forcing him to swerve to the right to avoid a collision. *See id.*, 922 P.2d at 813. The trooper followed the driver who stopped at a gas station. *See id.* When the trooper approached the driver, he noticed a "strong odor of intoxicants" coming from the driver's breath. *See id.* The trooper also noticed "poor finger dexterity" when the driver was searching for his license, registration and proof of insurance. *See id.* The trooper asked the driver to perform some field sobriety tests which he agreed. *See id.* The driver failed the field sobriety tests which included reciting the alphabet from *a* to *z*, walking a straight line and standing on one leg. *See id.*, at 813-14. At this point, the trooper concluded the driver was impaired. *See id.*, at 814.

Thereafter, the trooper requested the driver to submit to a preliminary breath test. The trooper advised the driver the results were not admissible and obtained his consent. *See id.* The

result was not preserved and the trooper did not recall the test result. *See id.* The driver was subsequently arrested for DUI. *See id.*

The driver moved to suppress the results of the Data Master on the grounds that the PBT was an illegal search in violation of the implied consent law. The motion was denied and the case proceeded to trial where the jury convicted *Smith* for DUI. *See id.*

After several appeals, the case was brought to the Washington Supreme Court for review. The Court commenced its analysis by discussing the portable breath test.

The present case is prompted largely by the decision of Trooper Wiley to use the PBT, a device counsel for the State referred to in oral argument as “experimental.” RCW 46.61.506(3) provides breath test results are valid only if administered in accordance with procedures adopted by the state toxicologist. That official has not approved the PBT for measuring alcohol in a person’s breath. WAC 448-13-020 (1996 Supp.) (“DataMater is the only breath test instrument approved by the state toxicologist”).

...

Nevertheless, in the absence of a *Frye* hearing on the PBT, or specific approval of the device and its administration by the state toxicologist, **the result garnered from the PBT is inadmissible for any purpose, and the State employs such unapproved devices at its peril if it attempts to use the evidence they generate to establish probable cause.** Here, there was ample evidence of Smith’s intoxication to establish probable cause **without the PBT.** 922 P.2d at 815 (Emphasis added).

In oral argument, the State suggested that the trooper may have used the PBT result to decide whether he had probable cause to arrest Smith for DUI. *See id.* at 816. The Court was not concerned because the evidence in the record established the trooper had probable cause before administering the PBT test. “Even if the PBT result had been improperly utilized to decide probable cause, the DataMaster results were not the fruit of the poisonous tree. Apart from the PBT result, there was ample evidence from the totality of the circumstances prior to the PBT result to support probable cause to arrest.” *Id.*

After reviewing the record, the findings of fact and arguments raised, the Court concluded the “evidence of Smith’s intoxication in the field overwhelmingly established probable cause” to arrest him. *See id.* at 818. The Court noted that the State complicated an otherwise “unremarkable DUI case” by administering the PBT test. In conclusion, the Court held, “[I]n this case, there was ample evidence apart from the PBT result to support probable cause to arrest Smith for DUI, and the BAC Verifier DataMaster results were therefore admissible.” *See id.*

The Washington Supreme Court again reaffirmed the proposition that results from PBT tests are inadmissible to establish probable cause for driving under the influence. *See Thompson v. State Dept. of Licensing*, 983 P.2d 601, 138 Wash.2d 783 (Wash. 1999).

Like Idaho, the state of Washington has not approved PBT tests for measuring alcohol in a person’s breath. Washington has a similar statute to Idaho in that breath test results are valid only if they are administered in accordance with procedures adopted by a state agency. *See* Idaho Code § 18-8002A(1)(e) (“Analysis of blood, breath or urine for the purpose of determining alcohol concentration shall be performed by a laboratory operated by the Idaho state police or by a laboratory approved by the Idaho state police under the provisions of approval and certification standards to be set by the Idaho state police, or by any method approved by the Idaho state police.”).

Both Officers Palic and Moore admitted that they were unaware of any statutory authority or any rules or regulations that governed administering a preliminary breath test. (TR., p. 20, Ll. 9-25, p. 33, Ll. 2-25, p. 34, Ll. 1-2). Officer Moore testified that “the State has never touched them and certified them as – for use in the field as an evidentiary test.” (TR., p. 37, Ll. 24-25, p. 38, L. 1).

The Magistrate held that the AlcoSensor test “clearly does not meet statutory requirements for admission of a breath test under I.C. 18-8004(4). *See*, R., p. 78. It is not certified or performance verified.” *See id.* The Magistrate also noted that there was no express statutory authority either prohibiting or permitting a preliminary breath test and was not aware of any Idaho case law discussing the use of PBTs. *See id.* at 78-79.

Officers Palic and Moore testified that a 15 minute wait before administering an evidentiary test was mandatory under the Idaho state police operating procedures. (TR., p. 19, Ll. 10-25, p. 20, L. 1, p. 35, Ll. 12-25, p. 36, Ll. 1-8).

Officer Palic admitted that he did not observe the 15 minute period prior to administering the preliminary breath test. (TR., p. 20, Ll. 2-5). Several Idaho appellate cases have held that an adequate foundation must be established to admit BAC results. *See, State v. Utz*, 125 Idaho 127, 867 P.2d 1001 (App.1993) (failure to closely observe the individual during the 15 minute period); *State v. Defranco*, 143 Idaho 335, 144 P.3d 40 (App.2006) (officer failed to monitor defendant for continuous 15 minute period immediately preceding test); *see also, State v. Remsburg*, 126 Idaho 338, 882 P.2d 993 (Ct.App.1994) and *State v. Carson*, 133 Idaho 451, 988 P.2d 225 (Ct.App.1999).

Although the foregoing cases are not directly on point with the issue of whether an evidentiary test can be used as the basis to supply an officer with probable cause, the cases are instructive to support the proposition.

Based on the foregoing facts, in addition to other findings of fact made by the Magistrate Court, which were supported by substantial and competent evidence in the record, the Magistrate concluded that the State failed to meet its burden that Mr. Nicolescu’s consent for taking the preliminary breath test was given freely, understanding and voluntarily. *See*, R., P. 81.

Contrary to the District Court's holding, the Magistrate held:

Without the preliminary breath test the officer **did not have the necessary reasonable and articulable suspicion to request Nicolescu submit to further evidentiary testing.** *See, R.*, p. 82. (Emphasis added).

It was the power of the Magistrate to assess the credibility of the witnesses, resolve factual conflicts, weigh the evidence and draw factual inferences from the evidence. The findings of fact determined by the Magistrate were supported by substantial and competent evidence in the record. Based on the testimony of the witnesses, the Magistrate was in the position to assess their credibility and specifically expressed the following based on Officer Palic's own testimony:

In this case Palic testified that based on what he had observed he would have arrested Nicolescu for suspicion of DUI prior to administering the preliminary breath test. **However, Palic's comments demonstrate there was uncertainty as to whether Nicolescu was under the influence. Palic indicated to Nicolescu that after the preliminary breath test he would make his determination from there.** *See, R.*, p. 79. (Emphasis added).

If reasonable suspicion is the standard to administer a preliminary breath test, more than speculation or instinct of the officer is required. *See, McCarthy, supra.* Further, the trial court must view the evidence from an objective basis since the subjective good faith of an officer is not enough. *See id.* However, based on the case and statutory authority provided herein, the proper standard to request a suspect to submit to a preliminary breath test or any other evidentiary test requires probable cause. Based on the facts of this case, Officer Palic did not have the requisite probable cause to request Mr. Nicolescu to submit to the preliminary breath test.

V. CONCLUSION

The practice of administering a preliminary evidentiary test in Idaho is unsettled and according to Officer Moore not uniform throughout the State. No rules or regulations have been

promulgated by the Idaho state police addressing when such method should be used and under what circumstances. Nor has the Idaho Legislature ventured in creating a law authorizing its use, unlike other jurisdictions. As a result, the uniform practice creates a slippery slope between an individual's constitutional rights and the state's legitimate interest for the safety of others, which practice can be fraught with abuse by officers.

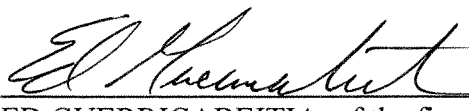
Officers, on mere hunches, suspecting an individual is operating a vehicle under the influence could simply demand the individual to submit to a preliminary breath test to form the officer's probable cause. Field Sobriety Tests would be irrelevant, and if administered would result in biased observations of officers to support an arrest.

The District Court judicially created a rule of law by relying on the statutory framework adopted by other states. If such practice is desired in the State of Idaho, the statute should be amended to allow for the practice which requires legislative action, not judicial reformation. This is the province of the legislature.

Based on the foregoing case law, statutory authority and arguments above, Mr. Nicolescu respectfully requests that this Court reverse the District Court's Memorandum Decision and Order entered on April 16, 2013 and affirm the Magistrate Court's Memorandum Decision Regarding Motion to Suppress entered on July 25, 2012.

DATED this 13th day of August, 2013.

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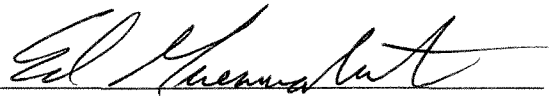
By: 
ED GUERRICABEITIA, of the firm
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of August, 2013, I caused to be served a true and correct copy of the foregoing document upon the following individual, by the method indicated, and addressed as follows:

Boise City Attorney's Office
P.O. Box 500
Boise, Idaho 83701-0500

[] U.S. Mail, postage prepaid
[☒] Hand Delivered
[] Facsimile



Ed Guerricabeitia



**Information Maintained by the Office of Code Revision Indiana Legislative Services Agency
IC 9-30-7**

Chapter 7. Implied Consent in Accidents Involving Serious Injury or Death

IC 9-30-7-0.5

Inapplicability to operator of personal assistive mobility device

Sec. 0.5. This chapter does not apply to the operator of an electric personal assistive mobility device.
As added by P.L.143-2002, SEC.9.

IC 9-30-7-1

Definitions

Sec. 1. (a) As used in this chapter, "portable breath test" means a hand held apparatus that measures the alcohol concentration in a breath sample delivered by a person into the mouthpiece of the apparatus.

(b) As used in this chapter, "fatal accident" means an accident, a collision, or other occurrence that involves at least one (1) vehicle and that results in:

(1) death; or

(2) bodily injury that gives a law enforcement officer reason to believe that the death of at least one (1) person is imminent.

As added by P.L.2-1991, SEC.18. Amended by P.L.275-2001, SEC.1.

IC 9-30-7-2

Implied consent to portable breath test or chemical test

Sec. 2. A person who operates a vehicle impliedly consents to submit to the portable breath test or chemical test under this chapter as a condition of operating a vehicle in Indiana. A person must submit to each portable breath test or chemical test offered by a law enforcement officer under this chapter to comply with this chapter.

As added by P.L.2-1991, SEC.18. Amended by P.L.275-2001, SEC.2.

IC 9-30-7-3

Offer of test; administration of test

Sec. 3. (a) A law enforcement officer shall offer a portable breath test or chemical test to any person who the officer has reason to believe operated a vehicle that was involved in a fatal accident or an accident involving serious bodily injury. If:

(1) the results of a portable breath test indicate the presence of alcohol;

(2) the results of a portable breath test do not indicate the presence of alcohol but the law enforcement officer has probable cause to believe the person is under the influence of a controlled substance or another drug; or

(3) the person refuses to submit to a portable breath test;
the law enforcement officer shall offer a chemical test to the person.

(b) A law enforcement officer may offer a person more than one (1) portable breath test or chemical test under this section. However, all chemical tests must be administered within three (3) hours after

the fatal accident or the accident involving serious bodily injury.

(c) It is not necessary for a law enforcement officer to offer a portable breath test or chemical test to an unconscious person.

As added by P.L.2-1991, SEC.18. Amended by P.L.275-2001, SEC.3.

IC 9-30-7-4

Breath analysis; blood, urine, or other bodily substance; testing requirements

Sec. 4. (a) If a chemical test conducted under this chapter involves an analysis of breath, the test must comply with the requirements under IC 9-30-6-5.

(b) IC 9-30-6-6 applies if a physician or a person trained in obtaining bodily substance samples who is acting under the direction of or under a protocol prepared by a physician or who has been engaged to obtain bodily substance samples:

(1) obtains a blood, urine, or other bodily substance sample from a person at the request of a law enforcement officer who acts under this section; or

(2) performs a chemical test on blood, urine, or another bodily substance obtained from a person under this section.

As added by P.L.2-1991, SEC.18.

IC 9-30-7-5

Refusal to submit; penalties; suspension; proof of future financial responsibility

Sec. 5. (a) A person who refuses to submit to a portable breath test or chemical test offered under this chapter commits a Class C infraction. However, the person commits a Class A infraction if the person has at least one (1) previous conviction for operating while intoxicated.

(b) In addition to any other penalty imposed, the court shall suspend the person's driving privileges:

(1) for one (1) year; or

(2) if the person has at least one (1) previous conviction for operating while intoxicated, for two (2) years.

(c) During the three (3) years following the termination of the suspension, the person's driving privileges remain suspended until the person provides proof of future financial responsibility in force under IC 9-25.

As added by P.L.2-1991, SEC.18. Amended by P.L.275-2001, SEC.4; P.L.94-2006, SEC.9; P.L.85-2013, SEC.98.

The Vermont Statutes Online

Title 23: Motor Vehicles

Chapter 13: OPERATION OF VEHICLES

23 V.S.A. § 1203. Administration of tests; retention of test and videotape

§ 1203. Administration of tests; retention of test and videotape

(a) A breath test shall be administered only by a person who has been certified by the Vermont criminal justice training council to operate the breath testing equipment being employed. In any proceeding under this subchapter, a person's testimony that he or she is certified to operate the breath testing equipment employed shall be prima facie evidence of that fact.

(b) Only a physician, licensed nurse, medical technician, physician's assistant, medical technologist, or laboratory assistant acting at the request of a law enforcement officer may withdraw blood for the purpose of determining the presence of alcohol or other drug. This limitation does not apply to the taking of a breath sample.

(c) When a breath test which is intended to be introduced in evidence is taken with a crimper device or when blood is withdrawn at an officer's request, a sufficient amount of breath or blood, as the case may be, shall be taken to enable the person to have made an independent analysis of the sample, and shall be held for at least 45 days from the date the sample was taken. At any time during that period the person may direct that the sample be sent to an independent laboratory of the person's choosing for an independent analysis. The department of public safety shall adopt rules providing for the security of the sample. At no time shall the defendant or any agent of the defendant have access to the sample. A preserved sample of breath shall not be required when an infrared breath-testing instrument is used. A person tested with an infrared breath-testing instrument shall have the option of having a second infrared test administered immediately after receiving the results of the first test.

(d) In the case of a breath test administered using an infrared breath testing instrument, the test shall be analyzed in compliance with rules adopted by the department of public safety. The analyses shall be retained by the state. A sample is adequate if the infrared breath testing instrument analyzes the sample and does not indicate the sample is deficient. Analysis of the person's breath or blood which is available to that person for independent analysis shall be considered valid when performed according to methods approved by the department of public safety. The analysis performed by the state shall be considered valid when performed according to a method or methods selected by the department of public safety. The department of public safety shall use rule making procedures to select its method or methods. Failure of a person to provide an adequate breath sample constitutes a refusal.

(e) [Repealed.]

(f) When a law enforcement officer has reason to believe that a person may be violating or has violated section 1201 of this title, the officer may request the person to provide a sample of breath for a preliminary screening test using a device approved by the commissioner of public safety for this purpose. The person shall not have the right to consult an attorney prior to submitting to this preliminary breath alcohol screening test. The results of this preliminary screening test may be used for the purpose of deciding whether an arrest should be made and whether to request an evidentiary test and shall not be used in any court proceeding except on those issues. Following the screening test additional tests may be required of the operator pursuant to the provisions of section 1202 of this title.

(g) The office of the chief medical examiner shall report in writing to the department of motor vehicles the death of any person as the result of an accident involving a vehicle and the circumstances of such accident within five days of such death.

(h) A Vermont law enforcement officer shall have a right to request a breath or blood sample in an adjoining state or country under this section unless prohibited by the law of the other state or country. If the law in an adjoining state or country does not prohibit an officer acting under this section from taking a breath or blood sample in its jurisdiction, evidence of such sample shall not be excluded in the courts of this state solely on the basis that the test was taken outside the state.

(i) The commissioner of public safety shall adopt emergency rules relating to the operation, maintenance and use of preliminary alcohol screening devices for use by law enforcement officers in enforcing the provisions of this title. The commissioner shall consider relevant standards of the National Highway Traffic Safety Administration in adopting such rules. Any preliminary alcohol screening device authorized for use under this title shall be on the qualified products list of the National Highway Traffic Safety Administration.

(j) A videotape made of the alleged offense and subsequent processing may be erased or destroyed by the law enforcement agency no earlier than 90 days after final judgment, or, if no civil or criminal action is filed, no earlier than 90 days after the date the videotape was made.

(k) A copy of a videotape made of the alleged offense shall be provided to the defendant within ten days after the defendant requests the copy and pays a \$45.00 fee for its reproduction. No fee shall be charged to a defendant whom the court has determined to be indigent. (Added 1969, No. 267 (Adj. Sess.), § 3; amended 1971, No. 14, § 8, eff. March 11, 1971; 1971, No. 260 (Adj. Sess.), § 48; 1973, No. 79, § 3, eff. May 23, 1973; 1975, No. 103, § 1, eff. May 30, 1975; 1981, No. 103, § 4; 1989, No. 68, § 4, eff. Dec. 1, 1989; 1991, No. 55, § 4; No. 57, §§ 1, 4, eff. July 4, 1991; 1997, No. 57, § 2; 1999, No. 160 (Adj. Sess.), § 17, eff. May 29, 2000; 2007, No. 153 (Adj. Sess.), § 2; 2011, No. 56, § 14, eff. March 1, 2012.)
